BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

REPLY COMMENTS OF TIME WARNER CABLE

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REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby respectfully submits these reply comments in connection with the above captioned Further Notice of Proposed Rulemaking released by the Federal Communications Commission ("Commission") on August 28, 1997.[1] Time Warner, through various subsidiaries and affiliates, operates cable television systems across the nation. Another Time Warner affiliate, Time Warner Communications Holdings, Inc., provides telephone and other telecommunications and information services in various

[1]Telecommunications Service Inside Wiring, Customer Premises Equipment, Further Notice of Proposed Rulemaking, CS Docket No. 95-184 (rel. August 28, 1997) ("Further Notice").

communities. As such, Time Warner is directly interested in the proposals set forth in the Commission's Further Notice as they might affect both cable television and telecommunications operations.

I. Introduction And Summary.

In its initial comments, Time Warner pointed out that the procedures suggested by the Independent Cable and Telecommunications Association ("ICTA") to govern the disposition of home run wiring in multiple dwelling unit ("MDU") buildings at such time as the incumbent multichannel video programming distributor ("MVPD") no longer has a legally enforceable right to maintain such facilities in the MDU (the "ICTA proposal") fail to advance the important goals espoused by the Commission -- enhancement of consumer choice and avoidance of disruption caused by removal of wiring. Time Warner also explained why the ICTA proposal fails to address the real problem -- the bottleneck power of MDU owners to deny multiwire competition. Time Warner's views on this subject were echoed by numerous commenters, notably Media Access Project/Consumer Federation of America ("MAP/CFA"), which concurred that the underlying problem in MDUs is that "landlords have obstructed tenants' ability to choose among competing MVPDs," and that it cannot be assumed that landlords will represent their tenants' best interests in obtaining access to MVPDs because:

> Landlords are profit maximizers, and therefore would be more concerned with accumulating the greatest amount of revenue in return for the lowest risk of damage, long-term investment, or variable costs.[2]

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[2]See MAP/CFA Comments at 9.

In order to address the real problem more directly, Time Warner suggested that the proposed procedures apply only where the MDU owner agrees to allow unit-by-unit competition among competing MVPDs. Similarly, to ensure that MDU owners make their decisions as to which MVPDs are allowed to offer service to MDU residents based upon the best interests of such residents, Time Warner suggested that the procedures should not apply where the MDU owner has received any consideration from the MVPD over and above a nominal amount.

As Time Warner demonstrated in its initial comments, none of the problems identified in the Further Notice are matters that could not be resolved through private contractual negotiations among the affected parties, and indeed such issues are often so addressed. Thus, rather than the complex and administratively burdensome regulatory scheme proposed by the Commission, Time Warner suggested a simple and straightforward rule requiring all contracts between MVPDs and MDU owners to include language that addresses the disposition of any home run wiring upon expiration of the contract. This simple rule would satisfy the Commission's goal of providing certainty, and avoiding confusion, on this matter.

Furthermore, Time Warner's initial comments included an extensive analysis demonstrating that the Commission lacks the jurisdiction to adopt the ICTA proposal, and that such proposal raises insurmountable problems under the Takings Clause of the Constitution. Again, Time Warner's position was supported by numerous and varied interests.[3]

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[3]See, e.g., Further Joint Comments of Building Owners and Managers Association International *et al.* ("BOMA Comments") at 8-9.

Finally, Time Warner's comments strongly endorsed the Commission's commitment not to "create or destroy any property rights,"[4] and not to "preempt an incumbent's ability to rely upon any rights it may have under state law."[5] In order to carry out these objectives, Time Warner urged the Commission to expressly confirm that certain fundamental prerequisites must be satisfied before any MDU wiring procedures can apply. First, home run disposition rules should apply only where the parties have otherwise failed to address such issues contractually. Only if the Commission makes clear that any proposed regulations do not abrogate any preexisting contractual rights can it fulfill its commitment not to "create or destroy any property rights." Second, any home run disposition rules adopted by the Commission can only apply where the incumbent MVPD has no continuing contractual or legal right to provide service to residents of the MDU, or retain its facilities within the MDU. Thus, for example, in any case where there is a dispute over the incumbent's continuing right to offer service or maintain its facilities in a particular MDU, the proposed procedures must be tolled until such dispute is resolved either among the parties or by a court. Similarly, the proposed rules cannot apply in any state that has enacted a right of access statute, because the incumbent per se has the right to maintain its facilities in MDU buildings against the owner's wishes in such states, a position fully endorsed by the State of New York Department of Public Service.[6]

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[4]Further Notice at ¶ 32.

[5]Id. at ¶ 34.

[6]See State of New York Department of Public Service ("NYDPS") Comments at 1-2.

Having restated certain fundamental issues set forth in its initial comments, Time Warner will proceed to reply to certain matters addressed by other initial comments filed in response to the Further Notice.

II. The Proposed Procedures Must Not Apply Until There Has Been A Final Resolution Of Any Dispute Relating To The Continued Right Of An Incumbent MVPD To Offer Service To MDU Residents Or Maintain Its Facilities On The MDU Property.

A. The Commission Should Not Adopt Any Presumptions That Affect The Legal Rights Of Any Party.

The Commission must reiterate that: 1) any home run disposition rules apply only where the incumbent MVPD has no continuing contractual or legal right to provide service to residents of the MDU or to retain its facilities in the MDU, and 2) an MDU owner has no right to unilaterally terminate an incumbent's right to continue providing service pursuant to a contract or local law, particularly given its strong natural incentives to do so.[7] The rules must be clear that any such procedures can lawfully apply only where the incumbent provider's contract to serve the MDU has expired and has not been renewed, and the incumbent no longer has a right to maintain its home run wiring on the MDU property "against the will of the MDU owner."[8] Unless a clear pronouncement is made that this is the case, there is a great likelihood that parties will attempt to use the new rules to abrogate legally valid contracts under the guise of Commission preemption.

Similarly, the Commission must not, as urged by ITCA,[9] create any presumptions regarding the relative rights of the parties if the incumbent's right to remain on the premises

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[7] See MAP/CFA Comments at 8-13.

[8] Further Notice at ¶ 34.

[9] See ICTA Comments at 3.

is disputed. Any such presumptions would contravene the Commission's commitment not to "create or destroy any property rights,"[10] nor to "preempt an incumbent's ability to rely upon any rights it may have under state law,"[11] and would likely result in an unconstitutional taking of property without just compensation.

Most importantly, if protection of the incumbent's property rights is to have any meaning at all, in any case where an incumbent's continued right, either to serve the property or retain its facilities on the property, is disputed, the procedures and deadlines proposed by the Commission must be tolled pending a final resolution of such dispute. Specifically, the Commission must clarify that its procedures do not apply in any case where there remains any dispute over the incumbent's right to continue to serve the MDU, over ownership of any facilities on the premises of the MDU, or over the right of the incumbent to maintain its facilities on the MDU premises after expiration of the contract. Only after such disputes have been resolved with finality under local law (or where the statute of limitations for the enforcement of such a legal right has expired), can the Commission ensure that its proposed procedural mechanisms "would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner."[12]

ICTA suggests that incumbent MVPDs, particularly franchised cable operators, have been overly litigious in defending their rights to maintain their inside wires within MDUs,

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[10]Id. at ¶ 32.

[11]Id. at ¶ 34.

[12]Id. (emphasis added).

frivolously claiming such rights simply to forestall competition.[13] Time Warner submits that it is the profit motives of MDU owners, intent on replacing an incumbent any time that an alternative MVPD offers the MDU owner higher compensation, that drives frivolous claims about rights in this area and necessitates litigation to protect rights MVPDs previously have been given by MDU owners. Time Warner agrees that such drawn out litigation is often counterproductive for all parties involved. Yet both the Commission's proposal, and various commenters' refinements and further proposals, would increase the amount of litigation, requiring an incumbent MVPD to file a lawsuit within 30 days after it receives a termination notice from an MDU owner, or else risk a presumptive "abandonment" of its legal rights.[14] Indeed, an incumbent MVPD would be forced to go to court in every situation, even if both parties agree that the issues and validity of claims are correctly in dispute and/or unclear. Not only is there no certainty that courts will be able to issue rulings on these disputes within 30 days, it is doubtful that such a requirement is the most productive alternative, considering the Commission's commitment not to destroy the valid property rights of incumbent MVPDs.

Such a proposal is also patently unconstitutional in that it would deprive incumbents of due process and would constitute a taking without just compensation. Furthermore, the Commission, as an administrative agency, lacks the constitutional power to prescribe a period of time in which either a state or federal court must issue a ruling in a case to which such court has subject matter jurisdiction, and such power is well beyond the Commission's statutory authority. Furthermore, the Commission does not have the authority to amend state

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[13]See ICTA Comments at 2-3.

[14]See RCN Telecom Services, Inc. ("RCN") Comments at 12.

statutes of limitation by forcing incumbent MVPDs to commence litigation on an expedited time schedule.

Instead, Time Warner suggests the following alternative to deter unnecessary litigation and delay. In any case where an MDU owner asserts that the incumbent MVPD does not have a valid right to remain in the building, and the incumbent claims to the contrary, but both parties agree that there is a valid dispute on this issue, then the proposed procedures should automatically toll, giving the parties more time to either work out such issues amicably, or seek a determination from an appropriate adjudicatory body. Conversely, if the MDU owner insists that any claims by an incumbent that it has an enforceable legal right to remain on the premises are frivolous, the incumbent would have to file a lawsuit in the 30-day period in order to toll the Commission's procedures. If the incumbent MVPD goes to court and wins under this scenario, the MDU owner would be required to pay not only damages, but also all court costs incurred by the incumbent MVPD in defending its valid rights. Such a procedure counters both MDU owners' incentives to claim there is no dispute when there actually is, while at the same time discouraging MVPDs from frivolously claiming legal rights that they do not actually have.

B. The Commission Must Clarify That Any Cable Home Run Or Home Wiring Rules Cannot Apply In States With Mandatory Access Statutes.

The Commission's assertion in footnote 100 of the Further Notice that

> if a state mandatory access statute only gives a provider access rights to an MDU if a resident requests service, once the resident no longer requests that provider's service, the provider's right to maintain a home run wiring dedicated to that subscriber would be extinguished[15]

[15] Further Notice at n.100.

is based on an incorrect assumption, and must be clarified so that the Commission's home wiring rules do not contravene existing state laws.

The Commission has specifically stated that its proposed rules

> would apply only where the incumbent provider no longer has an enforceable right to remain on the premises against the will of the MDU owner. In other words, these procedures would not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home runs on the property. . . . We are not proposing to preempt an incumbent's ability to rely on rights it may have under state law.[16]

Any rules, therefore, that have the effect of preempting existing state law, or infringing on the incumbent provider's enforceable rights under state law, should not be enacted.

In its comments, RCN not only endorses adoption of footnote 100, but also seeks to expand it to cover states with mandatory access statutes that are not triggered by a subscriber's request for cable service.[17] RCN argues that, in such states, the cable operator's right to maintain unused home run wiring in moldings or conduits somehow "blocks" competitive access.[18] Accordingly, RCN argues that the Commission should provide that a cable operator cannot block conduits or moldings with unused cable wiring, and that such a rule would not preempt state mandatory access statutes because those laws are not inconsistent with the proposed federal policy.[19] There are several flaws in RCN's argument.

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[16]Id. at ¶ 34.

[17]RCN Comments at 9-12; see also Wireless Cable Association ("WCA") Comments at 10-11.

[18]RCN Comments at 10.

[19]See id. at 11.

First, the Commission has expressed its intent not to enact any rules that apply when the incumbent provider still has existing rights to its cable wiring under state law.[20] In states with mandatory access statutes, the incumbent provider retains ownership over its internal wiring, even if that wiring is not currently being used to serve a particular dwelling unit.[21] The New York Department of Public Service, the government entity charged with regulating cable television service in New York, has explicitly stated that the Commission's proposed rules "should not apply to any entity that has installed facilities in an MDU building pursuant to a state right-of-access statute."[22] Moreover, the NYDPS firmly believes that the Commission should not enact rules that "create any presumptions or mechanisms with respect to rights conferred under state statutes."[23] This belief is consistent with the Commission's intent, and should be followed.

Second, the Commission has explicitly stated its intent not to preempt any existing rights under state law.[24] Contrary to RCN's claim, an expanded application of footnote 100 is directly contrary to the rights enjoyed by cable operators under existing state law.[25] For example, Pennsylvania's access statute expressly states that the operator who installs cable facilities pursuant to the access provision shall retain ownership of all such wiring and

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[20]Further Notice at ¶ 34.

[21]See 68 P.S. § 250.503-B (operator "shall retain ownership of all wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises"); see also Time Warner Comments at 31-33.

[22]NYDPS Comments at 2.

[23]Id.

[24]Further Notice at ¶ 34.

[25]But see RCN Comments at 11.

equipment in an MDU.[26] RCN's proposal is also in direct contravention with the interpretation of New York's mandatory access statute given by controlling New York authority.[27] In New York, once cable facilities are installed in an MDU pursuant to the access provision, the cable operator retains the right to maintain all of its wiring throughout the building, even those portions of the wiring that serve dwelling units where there may not be a current request for cable service.

Section 228(1) of New York's Public Service Law provides in pertinent part: "No landlord shall interfere with the installation of cable television facilities upon his property or premises . . . ." The constitutionality of this statute (then codified at Section 828 of the Executive Law) was established in Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981) rev'd on other grounds, 458 U.S. 419 (1982), on remand, 58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983) ("Loretto"). Under New York law, the right of a franchised cable operator to install facilities implies the right to maintain its facilities intact and free from interference on the premises after installation. Indeed, in Loretto, the Supreme Court recognized that the access law requires a building owner to permit the cable facilities to remain on its property:

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[26]See 68 P.S. § 250.503-B.

[27]See 86th Street Tenants Corp. v. New York State Comm'n on Cable Television, 627 N.Y.S.2d 693, 694-95 (A.D. 1 Dept. 1995) (upholding the NYSCCT's interpretation of New York's cable access statute as authorizing building-wide rather than piecemeal installation); see also Petition of Manhattan Cable Television, Inc., Order of Entry, Docket No. 80296, at 2 (NYSCCT, rel. January 14, 1993). Regulation of cable television in New York was formerly the responsibility of the New York State Commission on Cable Television ("NYSCCT"). In 1996, the NYSCCT was eliminated, and regulation of cable television was moved to the NYDPS.

> So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.[28]

Thus, any effort by the Commission to require incumbent cable operators to abandon, sell or remove their facilities in states with access statutes like New York would be directly contrary to the Supreme Court's ruling in Loretto.

By simply maintaining the wiring that they installed, cable operators are not "blocking competitive access;"[29] they are only retaining the cable distribution system that they rightfully installed pursuant to state law. RCN's cry that a cable operator's continued maintenance of its internal wiring discourages competition is merely a desperate attempt to usurp that wiring in the course of its own anticompetitive practices. The Commission should not attempt to enact rules that reach into areas, such as interpretation of individual states' mandatory access statutes, that are best left to state regulators and state courts to resolve.[30]

A federal regulatory policy forcing service providers to cede control over wiring that is theirs under state law should not be adopted, because any regulation that directly conflicts with existing state law might have a preemptive effect, which is contrary to the Commission's express intent.[31]

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[28]Loretto, 458 U.S. at 439.

[29]RCN Comments at 10.

[30]See NYDPS Comments at 2.

[31]See, e.g., City of New York v. FCC, 486 U.S. 57, 64 (1980); Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

C. The Commission's Home Wiring Rules Cannot Permit The Abrogation Of Existing Contracts.

The Commission has expressly stated its intent not to apply its proposed home wiring rules "where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on the property."[32] The Commission should adhere to its stated intent and refuse to extend application of the home wiring rules to situations where the disposition of MDU wiring is addressed by existing contracts.[33] MDU owners and MVPD service providers are equally able to conduct negotiations that result in contracts containing provisions that are acceptable to both parties.[34] Even if such contracts grant an exclusive right to offer MVPD service in a particular MDU, or grant the MVPD service provider exclusive rights to occupy conduit and molding, those provisions were negotiated by the parties, and should not be deemed "unfair" by Commission regulations that purport to abrogate the effectiveness of such terms.[35]

Where a contract exists between an MDU owner and an MVPD service provider, the terms of that contract should not be subject to alteration by Commission regulation.[36] For

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[32]Further Notice at ¶ 34.

[33]See, e.g., Jones Intercable et al. ("Jones") Comments at 16-17 & n.49; CableVision Comments at 11-13, 29; Time Warner Comments at 24-25.

[34]See Jones Comments at 16-17; see also BOMA Comments at 7 ("building owners have protected their interests through negotiation or are aware of their rights under state law").

[35]See Jones Comments at 16-17.

[36]BOMA has expressed concern that state law or an existing contract may contain provisions that differ from the Commission's proposed regulations, and that operators would point to the rules "as the sole source of building owners' rights and operators' obligations." BOMA Comments at 6-7. Neither building owners nor operators should have to wonder whether the state law and/or the contract they thought they were operating under is still

(continued...)

example, the Commission should not create a presumption that an incumbent provider has no enforceable legal right to remain on the premises of an MDU;[37] nor should the Commission place the burden of initiating a judicial proceeding to establish such an enforceable legal right on the incumbent provider.[38] Any presumptions or burdens that interfere with existing legal rights between cable operators and MDU owners should not be incorporated in the Commission's rules.

III. Penalties Are Unnecessary For Failure To Follow Through On An Election To Remove Home Run Wiring.

Several commenters suggest the imposition of forfeitures or other penalties by the FCC in the event the incumbent MVPD elects to remove the home run wiring and fails to

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[36](...continued)
controlling after the promulgation of new home wiring rules. The Commission should simply adhere to its initial proposal that any home wiring rules will not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on MDU property. Further Notice at ¶ 34.

[37]But see ICTA Comments at 3; WCA Comments at 9. WCA goes so far as to propose that, in order to "resolve this problem definitively," the Commission must "preempt all state mandatory access statutes and adopt a 'fresh look' policy for existing MDU service contracts, and thereby take the 'clear legal right to remain' issue out of the incumbent cable operator's hands in most cases." WCA Comments at 9. This proposal is directly contrary to the Commission's express intent in two respects -- it purports to abrogate existing MDU service contracts and seeks to preempt state access laws (see Further Notice at ¶ 34) -- and should not be adopted under any circumstances. Such total disregard for the Commission's commendable intent not to interfere with existing contractual and statutory law is unsupportable. See also Section II.B., *supra*, regarding discussion of preemption of state mandatory access statutes.

[38]But see ICTA Comments at 3; OpTel, Inc. ("OpTel") Comments at 2; RCN Comments at 12 (incumbent claiming the right to retain control over wiring, molding or conduits should be required to obtain a court order that it has right to retain such control).

follow through with such removal.[39] As explained below, any such penalties are unnecessary and would be counterproductive.

First, as Time Warner and others have pointed out, the procedures proposed in the Further Notice are fundamentally flawed because MDU owners will have no incentive to bargain in good faith during the initial 30-day period after the incumbent elects to sell. MDU owners (or alternative MVPDs) will only have an incentive to offer a fair price after the incumbent elects removal. To remedy this fatal defect, Time Warner has suggested a procedure whereby the MDU owner would be required to elect to either purchase the home runs, allow the incumbent to retain them on the premises for future use, or have them removed at the MDU owner's expense. Moreover, where the parties are unable to agree on the price, fair market value would be determined through binding arbitration, with the opportunity for a *de novo* adjudication of fair market value. Unlike the ICTA proposal, the procedure proposed by Time Warner would create incentives for the parties to bargain in good faith during the initial 30-day period to avoid the costs of arbitration or litigation.

Should the Commission proceed with the ICTA proposal, however, there should be no disincentive for the parties to continue their negotiations for a sale of the home runs after the initial 30-day negotiation period has failed to achieve an agreement and the incumbent then makes an election to remove. It seems beyond dispute that the Commission's stated goals in the Further Notice would always be better served through a mutually agreeable sale of the home runs than through removal of such facilities by the incumbent. Thus, the

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[39]See ICTA Comments at 8-9; OpTel Comments at 4; RCN Comments at 13-14; WCA Comments at 4-7; Heartland Wireless Communications, Inc. ("Heartland") Comments at 5-6.

suggestion by WCA that the incumbent's election to remove be "irrevocable"[40] should be rejected, because it would only interfere with the ability of the parties to negotiate an acceptable sale or lease price after an election to remove has been announced.

Indeed, it is apparent that alternate MVPDs are suggesting the imposition of penalties for failure to follow through on an election to remove merely to decrease the incumbent's bargaining power in negotiations over the fair market value of home run wiring. Incumbent providers are unlikely to obtain fair compensation until they make clear their resolve to remove the home runs in each and every case where the price is inadequate. The parties advocating forfeitures for failure to follow through with an election to remove do not cite even a single instance where an incumbent has threatened to remove its facilities and has later voluntarily abandoned them. Thus, forfeitures are entirely unnecessary and would be counterproductive to achievement of the Commission's stated goals.

Second, the Commission must understand that the ability to follow through on an election to remove is not entirely within the control of the incumbent MVPD. The proposed procedures do not even come into play until such time as the incumbent MVPD no longer has an enforceable statutory, contractual or other legal right to remain on the premises. Thus, when attempting to remove its facilities, the MDU owner will often attempt to bar the incumbent MVPD from even entering the property through claims of trespass. Similarly, MDU owners often attempt to require the incumbent to guarantee that it will repaint all the hallways, replace old wallpaper, or make other improvements to the property as MVPD facilities are removed in an effort to intimidate the incumbent into abandoning its facilities. At a very minimum, if forfeitures are adopted for an incumbent MVPD's failure to remove

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[40]See WCA Comments at 6.

its facilities, equivalent forfeitures must apply to any attempt by the MDU owner or alternate MVPD to block or interfere with such removal.

IV. Performance Bonds Are Unnecessary Where The Incumbent MVPD Elects Removal Of Home Run Wiring.

Several commenters suggest that the incumbent MVPD should be required to post a substantial performance bond when it elects to remove its facilities to ensure that the incumbent will repair any damage to the MDU caused by such removal.[41] As with the suggestion that forfeitures be imposed for failure to follow through on an election to remove, it is apparent that the performance bond requirement is suggested merely to place insurmountable obstacles to an election by the incumbent MVPD to remove its facilities, in the hopes that the new MVPD will receive a windfall. Again, the advocates of a performance bond do not submit one shred of evidence that any franchised cable operator has ever failed to repair any damage to MDU properties caused by the incumbent's negligence in removal of its facilities.[42] Indeed, franchised cable operators are typically covered by insurance, bonding, or similar requirements under their local franchises. Moreover, as BOMA admits, there is no basis for building owners to receive "protections in their dealings with cable operators."[43] MDU owners are perfectly capable of providing for repair of damages, allocation of liability, and other such matters in their contracts with MVPDs.

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[41]See ICTA Comments at 5-6; RCN Comments at 14-15; BOMA Comments at 7.

[42]By contrast, Time Warner has documented practices by MDU owners designed to "shake down" cable operators to make improvements to the MDU property as a price of doing business in that building. See Time Warner Ex Parte Notice in CS Docket 95-184, at Attachment 1 (filed October 28, 1996).

[43]See BOMA Comments at 9.

There is simply no reason for the Commission to become enmeshed in the morass of disputes that would undoubtedly ensue from any FCC-imposed performance bond requirement.

Time Warner is further concerned that the text of the proposed rule as it relates to removal of home run wiring is imprecise and likely to engender needless disputes. As proposed, the incumbent MVPD must "restore the MDU building to its prior condition." This language is unclear as to whether "prior condition" means the building's condition prior to the initial installation of the wiring, or just prior to removal. Moreover, MDU owners might go so far as to claim the incumbent MVPD has a responsibility to "restore" the building in ways wholly unrelated to removal of the wiring. Similarly, the incumbent MVPD should not be subject to strict liability in removal of wiring, but should only bear liability for negligence.[44] Such ambiguities and needless disputes can be remedied through language simply requiring the incumbent MVPD electing removal to "repair any damages to the MDU building directly caused by negligent removal of such wiring." This test is analogous to a cable operator's responsibility in connection with installation or removal of wiring in utility easements, as established by Congress in Section 621(a)(2)(C) of the Communications Act.

V. The Proposed Procedural Deadlines Should Not Be Any Shorter.

Several commenters suggest that the various proposed deadlines for an incumbent MVPD to announce its election regarding the disposition of its home run wiring at such time

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[44]Time Warner is extremely concerned that an MVPD removing wiring not be held responsible for damages caused by the new MVPD or be forced to bear the costs of installation by the new MVPD. Because such installation is likely to coincide with the removal of wiring by the incumbent MVPD, the rule must be perfectly clear that the MVPD removing wiring is not responsible for any damage which is not directly caused by its activities.

as it no longer has a legally enforceable right to retain such wiring on the MDU property be further shortened.[45] Efforts to shorten the procedural deadlines are a transparent attempt to erect as many hurdles as possible to restrict the ability of the incumbent MVPD to protect its legitimate property rights. Commenters proposing truncated procedural deadlines understand that if an incumbent MVPD fails to make a timely election at any step, the result under the ICTA proposal is that the incumbent MVPD will be deemed to have "abandoned" its MDU home run wiring, resulting in a windfall for the MDU owner and subsequent MVPD. As BOMA correctly points out, a regulation that does not give a party a realistic choice of how to deal with its property raises serious issues under the Takings Clause of the Constitution.[46] Any reduction in the proposed procedural deadlines would only further ensure that incumbent MVPDs are deprived of such a realistic choice.

Time Warner remains convinced that the Commission lacks jurisdiction to adopt the ICTA proposal and that such proposal fails to properly advance the goals identified by Congress and the Commission of enhancing consumer choice and avoiding disruption from removal of broadband distribution facilities. Nevertheless, if the Commission proceeds with any regulations modeled on the ICTA proposal, the procedural deadlines certainly should not be any shorter. The Further Notice sets out a carefully considered analysis in support of the proposed timetables. The advocates of shorter deadlines offer no compelling reasons why the affected parties should be rushed into making the important elections required by the proposed procedural timetables on an even more expedited basis.

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[45]See ICTA Comments at 7-8; RCN Comments at 13; WCA Comments at 12-13; Heartland Comments at 4.

[46]See BOMA Comments at 8.

Ironically, many of the same commenters advocating shorter procedural deadlines also urge the Commission take steps designed to ensure a smooth transition from one MVPD to the next.[47] However, shorter procedural deadlines would be entirely counterproductive to the goal of promoting seamless transitions. In its initial comments, Time Warner explained why, given the negotiation dynamics that would flow from adoption of the ICTA proposal, it is unlikely that a mutually acceptable sale or lease price will be negotiated during the initial 30-day period. Given the obvious desirability of a negotiated sale or lease over removal, this 30-day negotiation period should be extended, particularly in any case where the MDU owner and incumbent MVPD agree that such an extension might lead to an agreement with respect to the fair market value of the MDU home run wiring.

Under the current proposal, if an agreement cannot be reached in the initial 30 days, and assuming the incumbent elects to remove the home runs, such removal, as well as installation of new facilities by the subsequent MVPD, would have to be accomplished in 60 days. Again, any reduction in this tight timeframe would only complicate the transition process, possibly resulting in disruption of service to MDU residents.

In this regard, Time Warner opposes any mandatory requirement that the incumbent MVPD continue to provide service after its contract has expired.[48] With no valid contract,

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[47]See ICTA Comments at 3; RCN Comments at 7; WCA Comments at 11-12; BOMA Comments at 7-8.

[48]Indeed, any federal regulation requiring an MVPD to provide service against its will raises serious issues of compelled speech. See. e.g., Turner Broadcasting System, Inc. v. FCC, __U.S._, 114 S. Ct. 2445, 2458 (1994) ("[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression"); Wooley v. Maynard, 430 U.S. 705 (1997) (New Hampshire residents cannot be compelled to display state motto on their license plates); West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943) (public school children cannot be compelled to salute and pledge allegiance to the flag against their will).

the incumbent provider has no assurance that it will be compensated for its service. It is particularly unreasonable to expect the incumbent to continue providing service, with no guarantee of payment, until such time as the subsequent MVPD completes the construction of its facilities, an activity that is entirely beyond the control of the incumbent MVPD.

In the building-by-building context, where payment is received from the MDU owner pursuant to a bulk contract or similar arrangement, the incumbent should be under no obligation to continue providing service after receipt of a 90-day termination notice from an MDU owner, unless that notice is accompanied by an advance payment for the remainder of the contract term. If the MDU owner desires the incumbent to hold over beyond the expiration of the contract, the parties should be free to negotiate a mutually agreeable contract extension whereby the incumbent can protect its right to compensation. There is simply no need for an FCC regulation on this point. The same is true in a unit-by-unit context, or even in a bulk discount arrangement where the incumbent bills the MDU resident directly. Under those circumstances, the incumbent MVPD will have no incentive to terminate service absent a termination request from the MDU resident. To the contrary, where unit-by-unit competition is allowed by the MDU owner, the incumbent MVPD will have every incentive to continue serving its customers. Moreover, franchised cable operators often are bound by local franchise provisions dealing with termination of service, which again renders FCC intervention into this area unnecessary.

VI. The Commission's Proposed Regulation Appropriately Addresses Situations Where The Demarcation Point Is Physically Inaccessible.

Several commenters propose radical changes to the Commission's proposal to address those rare situations where the current point of demarcation for MDU home wiring is truly physically inaccessible. Such changes, if adopted, could be tantamount to a wholesale movement of the demarcation point to the lockbox, a proposal that the Further Notice has expressly rejected. For example, RCN argues that "physically inaccessible" should be defined to include any situation where the "conduit, wall or floor would need to be cut or altered to connect a home run wire to the demarcation point."[49] RCN apparently believes even hallway moldings that have been "designed for ease in opening and closing" can sometimes be deemed physically inaccessible.[50] Moreover, RCN argues that the demarcation point, even if readily accessible due to a pop-open hallway molding, should nevertheless be deemed physically inaccessible where there is inadequate space in that particular molding for the alternative MVPD's wiring.[51] Of course, the issue of sharing of molding or conduit is an entirely separate matter, properly addressed as such in the Commission's Further Notice, and cannot be allowed to be confused with the issue of physical inaccessibility.

The Commission has properly announced a common-sense, bright-line test to determine whether the MDU point of demarcation is truly physically inaccessible, i.e., where

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[49]RCN Comments at 3.

[50]Id. at 4, n.5.

[51]Id. at 3.

it is "embedded in brick, metal conduit or cinderblocks, not simply within hallway molding."[52] Contrary to RCN's unsupported suggestion, the demarcation point *per se* is accessible where MDU wiring is installed in moldings or similar plastic or metal enclosures installed in common hallways.[53] Time Warner has installed home run wiring using such techniques in literally thousands of MDUs in Manhattan alone, and it is remarkably rare that the point of demarcation is truly physically inaccessible. Similarly, where home run wires are simply "fished" into the hollow space between studs and behind drywall (and not enclosed in metal conduit), the point of demarcation is readily accessible by cutting a small, unobtrusive access panel in the drywall, just as is done to access electrical wiring, plumbing, etc.

Pursuant to the Commission's proposed revised regulation, where the MDU point of demarcation is in fact physically inaccessible, it would be moved to a point "as close as practicable thereto so as to permit access to the cable home wiring," regardless of whether such point is closer to or farther from the unit. RCN and others argue, however, that if the demarcation point is inaccessible at 12 inches outside of the unit, but readily accessible 6 inches outside the unit, the demarcation point should nevertheless be moved potentially hundreds of feet away from the unit to the lockbox.[54] Such a proposal is yet another thinly-veiled attempt to achieve an across-the-board movement of the MDU demarcation point.

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[52]Further Notice at ¶ 84.

[53]In Time Warner's experience, in the vast majority of cases, the hallway moldings are plastic and can be readily opened from the front and readily penetrated by a drill. Accordingly, the Commission must clarify that plastic moldings are *per se* physically accessible under its rules.

[54]See RCN Comments at 3; WCA Comments at 14; Heartland Comments at 6-7.